DATE: MARCH 26, 1996

CASE NO: 94-INA-490

In the Matter of

KIM, OH, CHO, INC.
Employer

on behalf of

SANG RYE HUH
Alien

Before: Jarvis, Vittone and Huddleston
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Kim, Oh, Cho, Inc.'s ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On January 21, 1993, the Employer filed a Form ETA 750, Application for Alien Labor Certification, with the District of Columbia Department of Employment Services on behalf of the Alien, Sang Rye Huh. AF 36-39. The job opportunity was listed as "Cook, Oriental Specialty," and the requirements were three years of experience in the job offered and knowledge of Korean and Chinese "dishes." AF 36. The job duties were listed as follows:

> Duties include to plan menus, cook Korean and Chinese, dinners, desserts, and other foods, according to recipe: Prepare meats, soups, sauces, vegetables, and other foods prior to cooking. Season and cook food according to prescribed methods. Estimate food consumption, requisitions or purchase supplies and etc...

AF 36.

Employer advertised the position as required, but received no referrals. AF 19. The application was therefore forwarded to the CO on February 10, 1994. AF 17-18.

The CO issued a Notice of Findings ("NOF") on February 17, 1994, proposing to deny certification on the ground that the job requirements were unduly restrictive. AF 14-16. The CO found that the job opening was for a "Specialty Cook," and not a "Specialty Cook, Foreign Food." The CO noted that under the *Directory of Occupational Titles* ("DOT"), "Specialty Cook" (313.361-026) has an SVP of 4, equivalent to six months to one year of combined education, training and experience. Thus, the CO concluded that the Employer's requirement of three years of experience in the job offered exceeded the requirement stated in the DOT and was therefore unduly restrictive. AF 15. The CO also found that the Employer's requirement that an applicant have knowledge of Korean and Chinese style cooking was unduly restrictive because the Employer does not offer Korean food on its menu, the majority of the food offered on its menu is American, and the few Chinese dishes that are offered are "common cuisine in the United States."[1] AF 15. The CO indicated that the Employer could either eliminate these requirements and re-advertise, or rebut his findings by showing that these requirements arise from a business necessity. In this regard, the CO required the Employer to submit "documentation that the job could not be performed with less than 3 years of experience in the job offered (Cook, Oriental Specialty)." AF 15. In addition, the CO also required the Employer to submit documentation that "the job could not be performed without knowledge of Korean and Chinese-style cooking." *Id.*

The Employer filed its rebuttal on March 25, 1994. AF 11-13. In regard to the

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[1] Attached to the NOF is an unclear photograph of the Employer's daily menu boards for Monday, Tuesday and Wednesday. Although the Tuesday and Wednesday boards are mostly unintelligible, the menu for Monday is as follows: sweet & sour chicken, chicken & gravy, chicken teriyaki, beef steak, beef liver, hot chili, green bean, macaroni & cheese, chicken stew, cream of broccoli, chicken noodle soup. AF 14.

number of years of experience required, the Employer stated that:

> [t]he Virginia Employment Commission properly classified the position under Occupational Code 313-361.030 [Specialty Cook, Foreign Food], which in the Dictionary of Occupational Titles (DOT) is assigned a Specific Vocational Preparation level (SVP) of "7".

AF 12. The Employer explained that an SVP of "7" requires over 2 years and up to 4 years of combined education, training and experience. Thus, according to the Employer, its requirement of 3 years of experience is not unduly restrictive. In regard to the Employer's requirement that an applicant have knowledge of Korean and Chinese style cooking, the Employer stated that it needs a cook with knowledge of Chinese style cooking to prepare the Chinese dishes that it offers on its menu "almost every day." AF 13. The Employer asserted that "[t]hese Chinese dishes require the services of a cook experienced in this specific type of food; skills which are very difficult to find among Americans." *Id.* In regard to the requirement that an applicant have knowledge of Korean cooking, the Employer acknowledged that no Korean dishes were offered on its menu because "Korean food is not as yet very popular with Americans." However, the Employer stated that its restaurant is "Korean-owned," "well known among Koreans in the area, and is patronized by a steady flow of Korean customers." According to the Employer, its restaurant is similar to traditional Korean restaurants where, although "there is no formal menu for Korean food; the customer simply asks for a common dish that he desires, and the restaurant whips it up." The Employer stated that since the owners are the only cooks available to prepare these Korean dishes, and they must devote their time to management, the restaurant can only offer its Korean customers about nine Korean dishes. The Employer added, however, that because of the increasing popularity of Korean food in the United States, it is "anticipated by the owner that Korean dishes will be added to the general menu after a cook is hired who is proficient in this type of food." AF 13.

The CO issued a Final Determination ("FD") denying labor certification on April 1, 1994. AF 8-10. The CO found that the Employer had not rebutted his finding that the job requirements were unduly restrictive. The CO noted the Employer's argument that it believes that the State Agency's DOT classification of "Cook, Specialty Foreign Food" (313.361-030) is more commensurate with the duties of the position offered than the CO's amended classification of "Cook, Specialty" (313.361-026). However, the CO stated that:

> . . . it was not a question of whether or not the VEC properly classified the position[,] it was your duty to provide documentation that the job could not be performed with less than 3 years of experience in the job offered (Cook, Specialty). You failed to do this so you remain in violation of this regulation.

AF 10. The CO also found that the Employer had not established that knowledge of Chinese style cooking is a business necessity because the Chinese dishes that it offers, such as sweet & sour chicken and chicken chop suey, have become common cuisine in the United States. Finally, in regard to the Employer's requirement that an applicant have knowledge of Korean style cooking, the CO found that the position offered was based on the restaurant's current menu and that since the current menu does not contain any Korean dishes, the Employer's requirement remained in violation of federal regulations. AF 10.

Employer filed a request for review and supporting brief on April 15, 1994. AF 1-7.

DISCUSSION

Section 656.21(b)(2) proscribes the use of unduly restrictive requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. The purpose of §656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.,* 87-INA-569 (Jan. 13, 1989)(*en banc*). Where an employer cannot document that a job requirement is normal for the occupation, or that it is included in the *Dictionary of Occupational Titles* (DOT), or that the requirement is for a language other than English, or involves a combination of duties, or is that the worker live on the premises, the regulation at §656.21(b)(2) mandates that the employer establish business necessity for the requirement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.,* 88-INA-82 (Feb. 9, 1989)(*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates, Inc.,* 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center,* 90-INA-395 (June 30, 1992).

Here, the Employer offers only two or three Chinese dishes on its menu "almost every day." These dishes include chicken chop suey, sweet and sour chicken, and chicken teriyaki. Employer argues that "[t]hese Chinese dishes require the services of a cook experienced in this specific type of food; skills which are very difficult to find among Americans." We do not find Employer's argument convincing. We agree with the CO that the Chinese dishes offered by the Employer are sufficiently common in the United States that they cannot be considered Chinese specialties which require the services of an experienced Chinese cook. Thus, knowledge of Chinese cooking is not essential to perform, in a reasonable manner, the duties of the position. Moreover, the fact that the Employer offers only a few of these dishes on its predominantly American menu further supports this finding.

Employer also has not demonstrated that prior knowledge of Korean cooking bears a reasonable relationship to the occupation in the context of the employer's business. Employer argues that, although Korean food is not currently offered on the menu, the restaurant offers approximately ten Korean dishes "off the menu" to its Korean clientele.

The Employer, however, does not provide any evidence in support of this assertion, such as receipts showing that the Employer purchased ingredients necessary to prepare Korean dishes or an affidavit from one of its Korean customers supporting its contentions. Although a written assertion constitutes documentation under *Gencorp,* 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *See generally, Our Lady of Guadalupe School,* 88-INA-313 (June 2, 1989); *Inter-World Immigration Service,* 88-INA-490 (Sept. 1, 1989), *citing Tri-P's Corp.,* 88-INA-686 (Feb. 17, 1989). Moreover, the Employer's assertion that it will expand its business by adding Korean dishes to the general menu after an experienced cook is hired is also not helpful to its case. Under these circumstances, the Employer must present documentation establishing a specific expansion plan, *See Advanced Digital,* 90-INA-137 (May 21, 1991), and Employer has not met this burden in the present case.

The burden of proof for obtaining labor certification is on the employer who seeks an alien's entry for permanent employment. 20 C.F.R. §656.2(b). Here, the Employer has failed to show that its requirement that an applicant have knowledge of Chinese and Korean cooking arises out of business necessity. Accordingly, the CO properly denied labor certification. In view of this determination, the classification issue need not be discussed.

ORDER

The CO's denial of certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/mg/bg